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Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 882

THOMAS R. REDDY,
Petitioner,
v.
UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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No.

THOMAS R. REDDY,
Petitioner,
v.
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Thomas R. Reddy, by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above cause on November 1, 1968.

Opinion Below.

The opinion of the Court below, printed in Appendix "A," hereto, *infra*, page 9, is reported in —F. 2d—.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Has the United States Court of Appeals for the First Circuit decided a federal question in a way in conflict with the applicable decisions of this Court?

2. Has the United States Court of Appeals for the First Circuit decided or failed to decide an important question of Federal Law which has not been, but should be, settled by this Court?

Constitutional and Statutory Provisions Involved.

1. The Fifth Amendment to the Constitution of the United States reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. 15 U.S.C. § 902(e), provides in pertinent part as follows:

> "(e) It shall be unlawful for any person . . . who has been convicted of a crime punishable by imprisonment for a term exceeding one year . . . to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

Statement of the Case.

This is an appeal by the defendant from a verdict of guilty of the offense of causing to be shipped and transported in interstate commerce, from Springfield in the Commonwealth and District of Massachusetts to Rutland in the State and District of Vermont, certain firearms, to wit, ten Smith and Wesson .38 special caliber Chiefs' Specials, the appellant having been convicted of a crime punishable by imprisonment for a term exceeding one year; in violation of 15 U.S.C. § 902(e). The case was tried before a jury in the District Court for the District of Massachusetts, the Honorable Frank J. Murray presiding, who, on the 19th day of February, 1968, adjudged the defendant convicted and guilty of the offense charged and imposed a sentence of four years' imprisonment, the execution of which was stayed pending appeal to the United States Court of Appeals for the First Circuit, which Court, after argument, entered its judgment as printed in Appendix "B" hereto, affirming that of the District Court of November 1, 1968.

On January 13, 1967, the appellant was in Rutland, Vermont, and on that date presented himself at the Wilson Sports Equipment Company, Inc., store, where he purchased three Smith and Wesson .38 caliber revolvers from a salesman named Donald MacIntosh. These weapons were already at the premises and in stock. At the same time Mr. MacIntosh and the defendant discussed the possibility of the defendant's purchasing additional weapons of the same caliber which were not then in stock. According to Mr. MacIntosh he advised the defendant that he would have to order these weapons from the Smith and Wesson factory, which was located in Springfield, Massachusetts.

Subsequent to this conversation Mr. MacIntosh, on or about January 21, 1967, phoned one Mr. Walsh in Quincy,

Massachusetts, who is a factory representative for the Smith and Wesson Company, and ordered additional weapons of the caliber sought by Mr. Reddy to be forwarded to the Wilson Sports Equipment Company, Inc., store in Rutland, Vermont. On or about January 24, 1967, Mr. Walsh, in accordance with this order from Mr. MacIntosh, picked up these weapons at the Smith and Wesson factory in Springfield, Massachusetts, and transported them to Rutland, Vermont, where he delivered them to Mr. MacIntosh. Following this, Mr. MacIntosh contacted Mr. Reddy and advised him that the revolvers were then in stock, after which Mr. Reddy presented himself at the Wilson Sports Equipment Company, Inc., store and took delivery, after payment, of ten .38 caliber Chiefs' Specials. It should be pointed out that, at the time, Mr. Reddy [illegible] his own name, address and phone number where he might be reached.

In the course of the trial it was shown that the appellant was charged with and convicted of a crime punishable by imprisonment for a term exceeding one year. This occurred in 1965, and the crimes of which he was convicted are covered by 18 U.S.C. §§ 495 and 1708.

Prior to trial the defendant filed a motion to dismiss the indictment on the ground that the statute under which he was indicted was unconstitutional. The motion was denied by the Court on January 24, 1968.

Argument.

1. The petitioner argues that the decision of the United States Court of Appeals for the First Circuit in this cause is in conflict with the applicable decisions of this Court, particularly that in *Aptheker* v. *Secretary of State,* 378 U.S. 500, 84 S. Ct. 1659. In that case, which also involved

Fifth Amendment Rights, as does the case at bar, this Court stated, at page 516:

> "[I]n appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute, in other factual contexts besides that at bar."

In that same decision this Court then proceeded to strike down the statute therein challenged as unconstitutional due to its overbreadth, which is the ground upon which petitioner has challenged 15 U.S.C. § 902(e).

The Court of Appeals, in this cause, as stated in its opinion, has refused to consider the possible consequences of this statute, in spite of the propriety of such considerations as espoused by this Court when deciding the constitutionality of a statute on its face. *Aptheker* v. *Secretary of State, supra.*

In the *Aptheker* case this Court also rejected the argument that a statute unconstitutional on its face could be held constitutional as applied to the particular appellants at bar. In conflict with this, the position taken by the Court of Appeals in this cause is that, since the petitioner is within the class of those "who has been convicted of a crime punishable . . . for a term exceeding one year," there is no need to consider the possible consequences or application of 15 U.S.C. § 902(e), that is to say, its overbreadth. As stated in *Aptheker* v. *Secretary of State,* at pages 515-516:

> "The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting. The situation here is different from that in cases such as *United States* v. *National Dairy Products Corp.,* 372 U.S. 29, where the Court is called upon to

> consider the content of allegedly vague statutory language. Here, in contrast, an attempt to 'construe' the statute and to probe its recesses for some core of constitutionality would inject an element of vagueness into the statute's scope and application; the plain words would thus become uncertain in meaning only if courts proceeded on a case-by-case basis to separate out constitutional from unconstitutional areas of coverage. This course would not be proper, or desirable, in dealings with a section which so severely curtails personal liberty."

Nevertheless, the Court below has impliedly said that the constitutionality of 15 U.S.C. § 902(e), will have to be considered in individual cases as they arise, which is precisely what this Court had decided is improper and necessitates taking "into account possible applications of the statute, in other factual contexts besides that at bar."

2. The Court of Appeals has decided that it is not unconstitutional for 15 U.S.C. § 902(e), to proscribe conduct as criminal which cannot constitutionally be so proscribed, and therefore has decided an important question of Federal Law which has not been, but should be, settled by this Court.

The purpose of section 902(e) is set out in 1961 U.S. Code Cong. & Adm. News, p. 3067. Briefly it is to aid the Federal Government to aid the states in their fight against organized crime, so called. It would appear that this section creates a presumption, or at least an inference, that one included in the class of those convicted of a crime punishable for a term exceeding one year who ships, transports or causes to be shipped or transported any firearms in interstate commerce is doing so to further the ends of organized crime, or perhaps is participating in it. This, it

is submitted, can be drawn from the purpose of the statute, though not specifically set forth, as was the case in 15 U.S.C. § 902(f). "This presumption does not exist in fact and cannot be brought into existence by legislative fiat." *Minski* v. *United States,* 131 F. 2d 614, 617; cert. den. 319 U.S. 775, 63 S. Ct. 143.

In a recent State Court decision in the District of Massachusetts wherein such a presumption linking one with prospective crimes was considered, the Court stated:

> "Taking each element of the offence separately none of them can constitute an offence. Certainly the fact that one has committed a past offence does not make him a present criminal. The concept of 'once a criminal always a criminal' is abhorrent to our law." *Alegata* v. *Commonwealth,* 1967 Mass. Adv. Sh. 1457, 1468; 231 N.E. 2d 201, 209.

The purpose of section 902(e) is laudable and unquestionably legitimate and permissible. But it is indiscriminately and drastically drawn.

> "Thus, while the statute may bring to book many who are about to commit a crime, it also brings within its sweep persons who have neither committed nor intend to commit any offence. There can be no doubt that a State may punish one for an attempt to commit a crime. But conduct which falls short of that (which is the aim of the statute here) has never been punishable." *Alegata* v. *Commonwealth,* 1967 Mass. Adv. Sh. 1457, 1469; 231 N.E. 2d 201.

As stated by Mr. Justice Jackson in *Williamson* v. *United States,* 184 F. 2d 280, 282-283 (2d Cir.), in a hearing relative to whether or not certain defendants were to be denied

bail because they might continue the activities for which they had been convicted:

> "It is . . . difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted."

This is exactly what section 902(e) would accomplish, that is, "the jailing of persons by the courts because of anticipated but as yet uncommitted crimes."

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE X. GIROUX,
One State Street,
Boston, Massachusetts,
Attorney for the Petitioner.

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7107.

THOMAS R. REDDY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Eugene X. Giroux for appellant.

William J. Koen, Assistant U. S. Attorney, with whom *Paul F. Markham,* United States Attorney, was on brief, for appellee.

November 1, 1968.

ALDRICH, *Chief Judge.* Defendant, in 1965, was convicted of theft of United States government obligations from the mail, and fraudulent alteration of such, both offenses punishable by more than one year in jail. 18 U.S.C. § 495, 1708. In 1967 he was charged with transporting ten .38 caliber revolvers in interstate commerce without ob-

taining a permit from the Secretary of the Treasury, a violation of 15 U.S.C. § 902(e) in view of his previous convictions. In the district court defendant moved to dismiss the indictment on the ground that section 902(e) was unconstitutional. The motion was denied. On this appeal from his conviction the sole question raised is the propriety of the denial of the motion.

Both in his brief, and in oral argument in response to a question from the court, defendant took the position that the statute was unconstitutional on its face, for overbreadth, because it included impermissible parties; defendant did not contend that he would be outside a properly drawn statutory classification.[1] Consequently, a necessary question, which neither party has discussed, must be whether the defendant has standing to assert as a vice in the statute the inclusion of other parties. In order to weigh defendant's claim to be heard, however, we must consider briefly the statute itself, and the asserted defect.

In its predecessor form section 902(e) prohibited interstate transportation of firearms only by persons whose prior offenses were crimes of violence. Act of June 30, 1938, ch. 850, § 2(e), 52 Stat. 1251. Its constitutionality was upheld in *Cases* v. *United States*, 1 Cir., 1942, 131 F.2d 916, *cert. denied sub nom. Velazquez* v. *United States*, 319 U.S. 770. As now enacted the statute includes all crimes of every description if the permissible sentence exceeds one

[1] We believe, in the light of defendant's conviction for theft, that this was a reasonable concession, and accept it without extended discussion. It is not "without support in reason," *United States* v. *Carolene Prods. Co.*, 1938, 304 U.S. 144, 155, to conclude that a thief whose crime was a federal felony is an undesirable person to possess firearms; proof of an inescapable relationship between past and future conduct is not requisite. *Hawker* v. *New York*, 1898, 170 U.S. 189. *See Green* v. *Board of Elections*, 2 Cir., 1967, 380 F. 2d 445, 451-52, *cert. denied* 389 U.S. 1048.

year. Defendant asserts, correctly enough, that under state law certain offenses of what might be thought fairly small consequence, or at least in no way indicative of a susceptivity to the misuse of firearms, are punishable by such imprisonment.[2] No court has discussed the propriety of regarding such offenses as indicative of possible unfitness to possess arms. Decisions under the present act have simply cited *Cases* and others without noting the enlargement of scope and the possible consequences. *E.g., DePugh* v. *United States,* 8 Cir., 1968, 393 F.2d 367, *cert. denied* 10/14/68;[3] *Brown* v. *Clark,* E.D.La., 1967, 274 F.Supp. 95.

We will not consider the consequences, either. This is a case falling within the usual rule that a party attacking a statute must show that his own constitutional rights are affected, not merely someone else's. *United States* v. *Raines,* 1960, 362 U.S. 17; *United States* v. *National Dairy Prods. Corp.,* 1963, 372 U.S. 29; see concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *TVA,* 1936, 297 U.S. 288, 345-48. There are, as pointed out in *Raines,* established situations which are spoken of as exceptions: where First Amendment rights have been invaded, *United States* v. *Robel,* 1967, 389 U.S. 253; *Thornhill* v. *Alabama,* 1940,

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[2] *See, e.g.,* Mass. Gen. Laws, c. 266, § 112 (maliciously disfiguring a horse or cow); c. 267, § 2 (forging a railroad or theatre ticket); c. 272, § 73 (defacing a gravestone); c. 273, § 1 (desertion and nonsupport). We were recently concerned with a New Jersey statute which in terms labelled the offense a misdemeanor, but permitted sentencing for more than a year. *Ciravolo* v. *United States,* 1 Cir., 1967, 384 F. 2d 54.

[3] *DePugh* involved another classification, which had always been present in the statute, equating a pending indictment with an actual conviction. DePugh sought, unsuccessfully, to show that after his federal conviction the state indictment, upon which it was predicated, was dismissed as defective. He did not make the present point that the statute was overbroad with respect to persons other than himself.

310 U.S. 88; where the rights of third parties can only be defended effectively in their absence, *Communist Party* v. *SACB,* 1961, 367 U.S. 1, 81; *NAACP* v. *Alabama,* 1958, 357 U.S. 449; where the statute is not severable and is unconstitutional in some particular, *Butts* v. *Merchants & Miners Trans. Co.,* 1913, 230 U.S. 126. Courts, also, will not attempt to rescue from a statute portions which could have been saved when the remnant would change the purpose of the statute or would make the statutory language substantially unintelligible. *United States* v. *Reese,* 1875, 92 U.S. 214; *see United States* v. *Raines, supra,* at 22. Whether, strictly, these are exceptions, or merely another form of a litigant's own rights, *see* Sedler, STANDING TO ASSERT CONSTITUTIONAL JUS TERTII IN THE SUPREME COURT, 71 Yale L.J. 599 (1962); H. Hart & Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 176-80 (1953), is not presently material. What is apparent is that defendant does not fall within them. To strike down the present statute, which clearly encompasses the defendant within both its letter and spirit, because of possible criticism of its outer perimeters, would be to deny the general rule to no good purpose.

Affirmed.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7107.

THOMAS R. REDDY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT

November 1, 1968

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
/s/ ROGER A. STINCHFIELD
Clerk.

Appendix C.

SUPREME COURT OF THE UNITED STATES

No. ————————, *October Term, 1968*

THOMAS R. REDDY, *Petitioner,*

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including 31 December, 1968.

/s/ ABE FORTAS
Associate Justice of the Supreme Court of the United States

Dated this 26th day of November, 1968.